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THE LEFT SIDE OF ANTITRUST: WHAT FAIRNESS MEANS AND WHY IT MATTERS

EDWIN J. HUGHES*

I. INTRODUCTION

Antitrust law is out of whack. Like other areas of the law, the doctrines of antitrust have historically reflected a tension between claims of allegedly wronged individuals and broader societal interests. On the one hand, antitrust plaintiffs invoke the law to remedy what they assert to be various forms of damaging and unfair competition. The interest in redressing particular acts of wrongdoing is referred to here as the left side of antitrust law. On the other hand, the principles of antitrust law are also designed to promote a market structure conducive to the efficient allocation of resources. This concern for efficiency is referred to here as the right side of the law.

The tension between concern for the victims of unfair business tactics and deference toward the type of vigorous competition that is the hallmark of an efficient market kept antitrust law on a roughly forward course for many years. But over the past fifteen years or so, an exclusive concern for economic efficiency has caused the law to tilt perilously to the right. Many courts have jettisoned concern for the individual competitor as an appropriate consideration of antitrust. As a result, unrestrained deference to a robust and free-swinging competitive process has come to dominate antitrust analysis and to doom most antitrust claims.

Plaintiffs, to their regret, have recently found many new ways to lose an antitrust case. For example, a discounting retailer challenging a termination can show that its supplier simply caved-in to the threats of a more powerful dealer upset about price competition. However, the plaintiff will lose unless it can also show that the supplier and complaining dealer had reached an agreement on prices to be charged by the dealer after the termination.¹

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1. *E.g.*, *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

A plaintiff may allege that a rival has attempted to monopolize a market by procuring through fraud on the Patent Office a patent on a process originally developed by the plaintiff. However, if the patent would have been issued to the plaintiff in the absence of the defendant's conduct, the plaintiff's antitrust claim fails no matter what the defendant did. Courts will reason that antitrust law does not attach significance to which party exploits the monopoly that the patent confers.²

A plaintiff can convince a jury that a rival with deeper pockets attempted to drive it out of business by slashing its prices below its costs. Nevertheless, the plaintiff will lose unless it can also show that its rival had a reasonable prospect of later recouping its losses by charging supracompetitive prices.³

Courts' recent hostility toward private antitrust claims is largely a consequence of the vacuum where the left side of antitrust should be. The wealth of scholarly interest in the efficiency consequences of antitrust doctrine has not been matched by concomitant attention to the issues of why and under what circumstances plaintiffs in antitrust suits have legitimate claims to the law's protections, regardless of the actions' effects on the market. With no effective counterweight to the well-developed concern for efficiency in antitrust enforcement, the law has been pulled so far to the right that it is nearly at the point of turning back on itself. Antitrust law is becoming so permissive as to be irrelevant.

The impact of the diminishing left side of antitrust can best be appreciated by first distinguishing the three spheres of antitrust. The first sphere encompasses enforcement of the *per se* prohibition against price-fixing agreements. The principal activity of this sphere is criminal and civil prosecution of bid-rigging and other types of price-fixing arrangements. This sphere bears more resemblance to other areas of the law that focus on white-collar crime than to the other two spheres of antitrust. Because price fixing is the one antitrust prohibition that is widely supported by adherents of a market structure approach to antitrust, the weakened state of the left side of the law has had little practical effect on the first sphere.

The second sphere of antitrust entails rules that govern cooperation and consolidation among substantial business entities. The issues in this sphere involve mergers, joint ventures, licensing agreements, and international application of the antitrust laws. This sphere of the law places

2. *E.g.*, *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 267 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985).

3. *E.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993).

more emphasis on industrial policy and international competition than the other two. Because the fairness concerns of individual competitors are generally remote from the market structure issues that dominate the second sphere, the left side of the law also has a small effect on the second sphere.

While the first two spheres regulate cooperative undertakings, the third sphere of antitrust is concerned with claims that firms were treated unfairly by their suppliers or competitors. Allegations involving price discrimination, vertical restraints, dealer terminations, and group boycotts are common in this sphere. The issues in the third sphere have more in common with those involving unfair competition and other business torts than with the concerns of the first two spheres. Because the pull of the left side of antitrust is most pronounced in the third sphere, that sphere has been most affected by the law's tilt to the right and is in danger of disappearing.

Although the right side of antitrust has been shaped by economic reasoning, the right side does not indiscriminately embrace whatever insights economic analysis generates. It is not the economic approach, but the approach invoked in service to a particular narrow vision of the law, that defines the right side of antitrust.

The courts' treatment of the concept of opportunistic behavior illustrates the right side's selective use of economic insights. The Seventh Circuit Court of Appeals utilizes the concept more often than any other court and is in the vanguard of the courts applying an approach to the law grounded in economic analysis. The reason is simple. The court is home to Judges Richard Posner and Frank Easterbrook, two acknowledged leaders of the field who, during their tenures at the University of Chicago Law School, developed many of the insights that guide the approach.

The concept of opportunistic behavior is based on the insight that contractual performance is usually not simultaneous. Because it is not, occasions arise where one party is in a position to attempt to exploit the investment that the other party has sunk in performance in order to strike a better deal. For example:

If A contracts to build a highly idiosyncratic gazebo for B, payment due on completion, and when A completes the gazebo B refuses to pay, A may be in a bind—since the resale value of the gazebo may be much less than A's cost—except for his right to sue B for the price. Even then, a right to sue for breach of contract, being costly to enforce, is not a completely adequate remedy. B might therefore go to A and say, "If you don't reduce

your price I'll refuse to pay and put you to the expense of suit"; and A might knuckle under. If such modifications are allowed, people in B's position will find it harder to make such contracts in the future, and everyone will be worse off.⁴

According to Judge Posner, "[T]he fundamental function of contract law (and recognized as such at least since Hobbes' day) is to deter people from behaving opportunistically toward their contracting partners."⁵

The Seventh Circuit has invoked the danger of opportunistic behavior in a broad range of contractual and quasi-contractual contexts. For example, the concept has provided the basis for the court's efforts to define the implied duty of good faith and fair dealing in contract law,⁶ to identify the distinguishing characteristics of business relationships protected by state dealer statutes,⁷ and to describe constraints upon firing employees who are terminable at will.⁸

One might think that this reasoning would also be utilized in third-sphere antitrust cases, which frequently involve claims of abuse of an ongoing business relationship. However, the same economics-oriented judges who willingly invoke this reasoning in other areas of the law resist it here. This tendency is illustrated by the Supreme Court's recent antitrust decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*⁹

The point of interest here is Justice Scalia's dissent. Justice Scalia, a former University of Chicago Law School colleague of Judges Posner and Easterbrook and Justice Department colleague of Robert Bork, has emerged among the justices as the most reliable spokesperson for the economic approach. In his *Kodak* dissent, Justice Scalia recognized that the situation challenged by the plaintiffs could give rise to opportunistic behavior. However, he denied that this danger is relevant to antitrust claims. Instead, Justice Scalia stated that this sort of "circumstantial power" is, in the words of an opinion written by Judge Posner, "a brief

4. *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1285 (7th Cir. 1986).

5. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 91 (4th ed. 1992) (footnote omitted).

6. *E.g.*, *Original Great Am. Choc. Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992); *Market St. Assocs. Ltd. Partnership v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991).

7. *E.g.*, *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 135 (7th Cir. 1990) (Indiana franchise statute); *Kenosha Liquor Co. v. Heublein, Inc.*, 895 F.2d 418, 418-19 (7th Cir. 1990) (Wisconsin dealership statute); *Moore v. Tandy Corp.*, 819 F.2d 820, 822 (7th Cir. 1987) (Wisconsin dealership statute).

8. *E.g.*, *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 438 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

9. 112 S. Ct. 2072 (1992).

perturbation in competitive conditions—not the sort of thing the antitrust laws do or should worry about.”¹⁰

In the third sphere of antitrust, attempts to exploit circumstantial power are far more common than attempts to exploit monopoly power resulting from domination of a properly defined market. The effect on the victim of the exploitation is the same, regardless of the source of the power. The next section of this Article explores the reasons why the “Chicago School” economic approach seeks to dramatically shrink the third sphere of antitrust by removing from the law’s domain the most common occasions for the exercise of power.

This Article then describes shortcomings in the Chicago School approach, both in its theory and its implications. Next, in an attempt to help revitalize the left side of antitrust, competitive fairness is proposed as an appropriate counterweight to economic efficiency in deciding third-sphere cases. This Article concludes with a discussion of how courts could balance the interests of fairness and efficiency in third-sphere cases in ways that are manageable, predictable, and more faithful to the animating principles behind the antitrust laws.

II. THE CHICAGO SCHOOL OF ANTITRUST ANALYSIS

A. *The Chicago School Approach as Theory*

Two interrelated factors account for the contraction of the third sphere. The first is increased judicial acceptance that the exclusive goal of antitrust law is to further what economists call consumer welfare. The second is increased judicial reliance upon profit maximization theories in antitrust litigation. These factors yield a closed system of mutual justification that tends to mask the unreality of the enterprise and its lack of historical and political legitimacy.

1. The System of Economic Analysis

a) *Consumer Welfare as the Exclusive Goal of Antitrust*

Courts that have aggressively ruled in ways that shrink the third sphere of antitrust have described the exclusive goal of antitrust law to be “consumer welfare,” as economists understand the term. According to this view, the sole purpose of the law is to promote the most efficient ordering of the market for the benefit of consumers. The market is arranged efficiently when resources have gravitated to those who value

10. *Id.* at 2098 (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988) (Posner, J., dissenting), *cert. denied*, 493 U.S. 847 (1989)).

them most, with value understood to mean willingness and ability to pay.¹¹ Hence, antitrust law should attack impediments to market efficiency.¹²

How the courts have come to accept consumer welfare as the exclusive goal of antitrust is a story of an academic theory seized upon and exploited for political ends. Robert Bork provided the justification for judicial acceptance, the Supreme Court in the 1960s and early 1970s unwittingly provided the opportunity, and the Reagan Administration provided the momentum.

The story begins in Chicago in the 1950s. Aaron Director, a professor of economics at the University of Chicago Law School, began to analyze business behavior condemned by antitrust through the lens of price theory. Director's analysis showed that many practices condemned by antitrust law could promote efficiency. Director's method of analysis proved fruitful, and many of his students and colleagues continued his work.¹³

As the Chicago School analysis was developing, antitrust analysis in the courts was proceeding down a quite different path. Throughout the 1960s and early 1970s, the Supreme Court issued a series of antitrust decisions that only plaintiffs' lawyers could love. The 1960s were salad days for antitrust plaintiffs. Not only did the Court invariably identify a basis for antitrust liability, at times the Court also announced rules far more expansive than any of the parties had urged.¹⁴

11. POSNER, *supra* note 5, at 13.

12. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984).

13. See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-26 (1979). Robert Bork has described Director as "the seminal thinker in antitrust economics and industrial organization." ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* at ix (1978) [hereinafter *THE ANTITRUST PARADOX*]. Although Director did not publish much, Posner identifies the following articles as elaborations of ideas formulated by Director: Robert H. Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); Lester G. Telser, *Why Should Manufacturers Want Free Trade?*, 3 J.L. & ECON. 86 (1960). Posner, *supra*, at 926 n.2.

14. See, e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery*, 384 U.S. 270 (1966). In *Von's Grocery* and *Schwinn*, the Court adopted rules for mergers and vertical territorial restraints that were broader than the Justice Department had sought. Posner has explained these decisions as an effort by the Court to strengthen the hand of the antitrust enforcement agencies:

The Supreme Court's antitrust decisions during this period were unusually vulnerable to criticism that they were result-oriented and unprincipled.¹⁵ The decisions did not set forth clear and workable rules for lower courts to apply to similar cases. As lower court judges attempted to make sense of the law, defendants pointed them toward Chicago, where a coherent approach to the law was taking shape.

Any judges tempted by the Chicago School of thought still needed some authority to make the leap from the proposition that economic analysis *could* provide a workable approach to antitrust to the proposition that courts *should* rely on economic analysis to interpret the law. Robert Bork supplied the bridge to move from the positive to the normative. In 1966, Bork published an article intended to justify consumer welfare as the sole goal of antitrust on the basis of the legislative history of the Sherman Act.¹⁶ Bork continued to push his case in his influential book, *The Antitrust Paradox*.¹⁷

By the time Ronald Reagan was elected in 1980, the Supreme Court's antitrust jurisprudence of the 1960s was widely considered to be intellectually bankrupt.¹⁸ Bork had supplied a basis for arguing that Congress had always intended that antitrust law be interpreted in a way akin to the Chicago approach. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,¹⁹ a 1977 decision, the Supreme Court began to move toward an approach that explicitly relied upon economic analysis.

In the 1960s, when most of the important antitrust cases were still government cases and the typical private plaintiff was (or at least was believed to be) a "free rider" on some earlier government suit, the Supreme Court—in part I believe in order to lighten its own antitrust docket—wrote the enforcement agencies virtually a blank check, perhaps trusting to the continued exercise by the agencies of a sober self-restraint in filling in the blanks.

RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 229 (1976) (footnotes omitted).

15. *Von's Grocery* was the occasion for dissenting Justice Stewart's well-known observation: "The sole consistency I can find is that in litigation under § 7 [of the Clayton Act] the Government always wins." *Von's Grocery*, 384 U.S. at 301 (Stewart, J., dissenting).

16. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

17. *THE ANTITRUST PARADOX*, *supra* note 13.

18. President Reagan's first Assistant Attorney General in charge of the Antitrust Division, William F. Baxter, was characteristically blunt in his assessment of the earlier state of the law: "There simply is no respectable intellectual support, at least among academic economists, for the outmoded, amateur jerry-built, pseudo-economic propositions that underlay so much of antitrust during the sixties and on into the early seventies." *Interview with William F. Baxter, Assistant Attorney General, Antitrust Division*, 52 ANTITRUST L.J. 23, 42 (1983).

19. 433 U.S. 36 (1977).

President Reagan added momentum to this trend by plucking from academia many of the most articulate spokesmen for the Chicago School approach and installing them on the courts of appeals. The new judges, including Bork on the Court of Appeals for the District of Columbia and Richard Posner and Frank Easterbrook on the Seventh Circuit, began to write opinions reflecting the Chicago approach, including the view that consumer welfare should be the exclusive focus of the law.²⁰

These decisions provided authority for subsequent decisions along the same lines. Today, one seeking to persuade a court to adopt an economic approach to an antitrust issue need not rely on only law review articles, such as Bork's 1966 article, but instead can string together extensive citations to recent case law to support the proposition that Aaron Director had the right idea all along.

b) The Profit-Maximization Hypothesis

The Chicago School approach relies on the profit-maximization hypothesis for the tools of analysis necessary to further the consumer welfare goal. According to this hypothesis, all human interactions can be analyzed as voluntary and discrete market transactions. Because they are voluntary, all transactions must make both parties better off; otherwise, they would not take place. This means that transactions can be usefully analyzed by asking what each participant gets out of the exchange. The discrete nature of the transaction means the analyst need look no further than the actual exchange. Analysts can thus interpret observed market behavior by searching for explanations of the economic logic behind the activities.

In its purest form, articulated most forcefully by Robert Bork, the profit-maximization approach is simplicity itself when applied to business activities at issue in antitrust disputes. All business activities are designed to maximize profits. There are only two possible avenues for firms seeking to increase their profits. The first is to operate more efficiently and thereby capture more profits from sales at the competitive

20. *E.g.*, *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1400 (7th Cir. 1989) (Easterbrook, J.), *cert. denied*, 494 U.S. 1019 (1990); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.), *cert. denied*, 480 U.S. 934 (1987); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 190 (7th Cir. 1985) (Easterbrook, J.); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) (Posner, J.); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 707 (7th Cir.) (Posner, J.), *cert. denied*, 469 U.S. 1018 (1984); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.).

price. The second is to exercise monopoly power, which will restrict output and raise prices above the competitive level, and thereby decrease sales and increase profits. All business strategies must be intended as steps toward greater efficiency or steps toward monopoly.²¹

Seeking higher profits by restricting output is generally impractical. Assuming that barriers to entry in the relevant market are low (and barriers are nearly always low in the absence of government interference²²), monopoly power is virtually impossible to achieve or maintain for any significant length of time. Any effort to restrict output by one firm will be met with expanded output by other firms. In the vast majority of cases, unhindered market forces are an effective check against the development of monopoly power.²³

Because nearly all firms know that they cannot succeed in achieving or exercising monopoly power, they do not try. Therefore, their strategies must be to increase their efficiency. Since efficiency is the single goal of the antitrust laws, such strategies cannot amount to violations. The profit-maximization hypothesis provides the means for reasoning that most actions challenged under the antitrust laws do not seriously threaten consumer welfare.

2. The Logic of the Chicago School Approach

a) *The Problems*

There are serious problems with both components of the Chicago School method of analysis. First, it is difficult to understand why consumer welfare should be accepted as the exclusive goal of antitrust law. Indeed, it is counterintuitive to believe that Congress adopted a statute based entirely on an abstraction like consumer welfare. What sort of political forces could possibly provide the impetus for this exercise in applied economic theory?

Moreover, the Chicago School approach is based on an economic hypothesis whose advancement began years after the passage of the Sherman Act in 1890.²⁴ To assume that Congress was driven by abstract

21. *Rothery Storage & Van Co.*, 792 F.2d at 221 (Bork, J.) ("If it is clear that [the defendant] and its agents . . . are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more effective. No third possibility suggests itself.").

22. Posner, *supra* note 13, at 946-47.

23. Easterbrook, *supra* note 12, at 20.

24. See Frank H. Easterbrook, *Commentary: Antitrust 1889*, 29 WASHBURN L.J. 150, 151 (1990); George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1, 3 (1982).

academic theories is difficult, but to suggest that Senators and Representatives were somehow psychic in anticipating the hypotheses and formulas that would later develop is absurd.

In his 1978 book, Bork argues that "[t]he legislative history of the Sherman Act, the oldest and most basic of the antitrust statutes, displays the clear and exclusive policy intention of promoting consumer welfare."²⁵ The sense of certitude suggests that Bork's assertion is firmly grounded in fact. However, subsequent scholarship has clearly demonstrated that Bork's work is not a respectable piece of historical research.²⁶

A serious problem with the profit-maximization hypothesis is that it does not work very well. While the hypothesis may illuminate general trends over time, it is not useful in explaining the particular actions at issue in antitrust or any other litigation. The world we actually inhabit includes mistakes, imperfect information, and asymmetries between the goals of a firm and the goals of individual decision-makers within that firm. There is simply no reason to assume that antitrust defendants rationally and correctly selected the particular actions under judicial scrutiny as profit-maximizing responses to market conditions.

This point has won recognition as litigants have attempted to rely upon the assumption for purposes other than arguing why an antitrust case should be dismissed. For example, in *AMPAT/Midwest, Inc. v. Illinois Tool Works, Inc.*,²⁷ the defendant, appealing a finding of fraud, argued that the plaintiff's theory assumed that the defendant had acted irrationally. Writing for the court, Judge Posner did not think that this was reason to discount the theory:

[I]t is not a defense to fraud that the defendant erred in thinking fraud the profit-maximizing response to the problem in which it found itself. Litigation arises from the pathology of social interactions, so we should not be surprised that often parties to litigation appear to have acted from incomprehensible motives,

25. THE ANTITRUST PARADOX, *supra* note 13, at 61 (citing Bork, *supra* note 16).

26. E.g., Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1019 (1989); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67, 68 (1982); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 259 (1989); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1223 (1988); Rudolph J. Peritz, *The "Rule of Reason" in Antitrust: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285, 287 (1989); F.M. Scherer, *Efficiency, Fairness, and the Early Contributions of Economists to the Antitrust Debate*, 29 WASHBURN L.J. 243, 247 (1990).

27. 896 F.2d 1035 (7th Cir. 1990).

behaved irrationally, misconceived their self-interest, exhibited bizarre deviations from rationality.²⁸

Although courts are willing to recognize "bizarre deviations from rationality" in other contexts, the profit-maximization hypothesis allows for no such exceptions. Its assumption that firms always act rationally to maximize their profits leads to unfortunate consequences. Courts almost invariably tolerate a firm inflicting harm on its competitors on the assumption that the injuries suffered are the unfortunate but necessary by-products of the march toward a more efficient economy. In fact, there may have been nothing efficient about the actions; the litigation may have arisen from "the pathology of social interactions," and the firm doing the damage may simply have wanted to cripple its rivals.

b) The Responses

Advocates of the Chicago School approach have responded to the foregoing criticisms of their two basic premises. Both responses entail a two-step argument. One of the steps of each argument relies upon an attribute of the premise that is not under attack as a way of justifying the premise that is under attack.

(i) The Consumer Welfare Goal

Today, not even the Chicagoans appear willing to defend the historical scholarship of Robert Bork. Instead, the first step in the Chicagoans' defense of an exclusive focus on consumer welfare is a declaration of agnosticism as to the actual legislative intent of the Sherman Act. Judge Posner's discussion of legislative intent is typical:

I don't think the Senators and Congressmen who voted for the Sherman Act had any clear idea of what it was to do. They were worried about trusts, but behind that almost meaningless generality, different members of Congress had different concerns. Some were concerned because trusts were hurting consumers, and some were concerned because they were hurting other sellers. So it is a confused picture. It seems to me that courts have to make sense out of the statute pretty much on their own, without the benefit of legislative history.²⁹

28. *Id.* at 1043.

29. From Von's to Schwinn to the Chicago School: Interview with Judge Richard Posner, *Seventh Circuit Court of Appeals*, ANTITRUST, Spring 1992, at 4, 4. This view reflects a bit of back-pedaling on the part of Judge Posner. In 1976, Posner cited to Bork's article as support for the proposition that the "framers of the Sherman Act appear to have been concerned

Once legislative intent has been dismissed as a source of interpretative guidance, the Chicago School advocates proceed to the second step of the argument. They attempt to justify the consumer welfare goal on the basis of the profit-maximization hypothesis. The approach is to be endorsed because, thanks to the hypothesis, it leads to clear and workable rules to resolve nearly all antitrust issues. The implications of the profit-maximization hypothesis are all that a judge needs to resolve any antitrust dispute. The attraction of the approach is magnified when it is stacked up against other approaches that lack a tool as simple yet powerful as the profit maximization hypothesis. In comparison, other concepts of the law appear result oriented and unable to generate objective and workable rules.

Easterbrook has neatly summarized the two-step justification for an exclusive consumer welfare goal: "I agree with Robert Bork that, whatever one makes of [the legislative] history, the antitrust laws should be treated as if they served no goal other than economic efficiency. . . . Any other approach renders the statutes incomprehensible."³⁰

(ii) The Profit-Maximization Hypothesis

The problem with the profit-maximization hypothesis is that it does not work very well when applied to the particular actions at issue in antitrust litigation. The first of the two steps in the Chicagoans' response invokes the consumer welfare goal.

Because the sole purpose of the law is assumed to be the efficient ordering of the market, the claims of firms injured by allegedly anticompetitive acts are only entitled to consideration to the extent that the acts inflicting the injury are also inefficient. "The antitrust laws are designed to maximize welfare by protecting competition, not competitors. A practice that injures competitors is thus of no antitrust concern unless it also reduces consumers' welfare."³¹

Thus, the direct victims of the actions challenged in antitrust litigation have no inherent call on the law's protections. As Judge Easterbrook has written, "Antitrust law condemns *results* harmful to consumers; it condemns bad means to the extent they have a tendency to

mainly with the price and output consequences of monopolies and cartels." POSNER, *supra* note 14, at 23.

30. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 266 n.11 (1981) [hereinafter *Predatory Strategies*].

31. *Id.* at 266 (footnote omitted).

bad results. . . . Acts that do not harm consumers need not be justified.”³²

Once this first step is accepted and qualms about the plight of those seeking the law’s protection are shunted aside as beyond the proper concern of antitrust, then the unreliability of the profit-maximization hypothesis can be addressed in a straightforward manner. The issue becomes one of comparative advantage. No rule is perfect. Is it better to rely on the profit-maximization hypothesis, knowing that there will be some false negative errors whereby courts fail to condemn truly anticompetitive behavior? Or is it better for courts to apply a stricter rule that will result in some false positive errors whereby courts condemn behavior that is actually efficient and procompetitive?

For reasons explained by Easterbrook, the choice is an easy one for Chicago School advocates:

If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of *stare decisis*, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry.³³

In one of his first antitrust decisions, Judge Posner made a similar point in explaining why courts should demand a showing of market power before condemning a vertical restraint:

A firm that has no market power is unlikely to adopt policies that disserve its consumers; it cannot afford to. And if it blunders and does adopt such a policy, market retribution will be swift. Thus its mistakes do not seriously threaten consumer welfare, which is the objective that we are told should guide us in interpreting the Sherman Act.³⁴

The consumer welfare goal teaches us that the sole concern of antitrust law is with actions designed to restrict output and raise prices. Given the effectiveness of market forces in countering and frustrating such strategies, little justification usually exists for, in Judge Posner’s words, “trundling out the great machinery of antitrust enforcement.”³⁵

32. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 564 (7th Cir. 1986) (Easterbrook, J., concurring in part and dissenting in part); *see also* *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 655 (7th Cir. 1984).

33. Easterbrook, *supra* note 12, at 2; *see also* *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 676 (7th Cir.) (Easterbrook, J.), *cert. denied*, 113 S. Ct. 409 (1992); *THE ANTITRUST PARADOX*, *supra* note 13, at 133.

34. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

35. *Id.*

As Easterbrook adds, "Anticompetitive business practices customarily predecease the litigation they spawn."³⁶

To Chicagoans, the false negatives generated by the profit maximization hypothesis are thus preferable to false positives generated by other ways of determining liability. Accordingly, the unreliability of the hypothesis is not enough to disqualify the Chicago School approach.

c) The Problems Remain

The self-referential justifications that the consumer welfare goal and the profit-maximization hypothesis offer each other create a Möbius strip of rationalization. But once the goal and the tool of the Chicago approach are each assessed on their own merits—free of the support the other provides—the foundations of the Chicago approach reveal serious fissures.

(i) The Consumer Welfare Goal

If consumer welfare has no historical legitimacy as the exclusive goal of antitrust law, it cannot be justified by the easy application of the profit-maximization hypothesis that it generates. Cut loose from any relationship to the purpose of the law, an interpretive principle's ease of application is not a compelling virtue. A rule that victory in antitrust litigation goes to the party who is taller or whose last name contains the most letters would be even easier to apply. But no one would recommend either of these rules of decision; their application would be arbitrary and do nothing to advance the purposes of the law. Likewise, the rules for decision derived from the profit-maximization hypothesis cannot by themselves justify the consumer welfare goal. If there is a discernible purpose behind the law aside from consumer welfare, courts are not entitled to ignore it in order to make their jobs easier.

(ii) The Profit-Maximization Hypothesis

The profit-maximization hypothesis is unreliable when applied to the particular actions at issue in antitrust litigation. This shortcoming cannot be excused by reference to the constricted sense of the purpose of the law that an exclusive focus on consumer welfare prompts. If antitrust plaintiffs injured by truly anticompetitive actions lose their lawsuits because the profit-maximization hypothesis is too blunt an instrument to permit a court to appreciate the merits of their claims, it is not a satisfac-

36. Easterbrook, *supra* note 12, at 33.

tory response to assert that the victims of anticompetitive actions have no inherent call on the law's protections.

Further, the unreliability of the hypothesis cannot be justified by the comparative advantage defense because this proves too much. The approach certainly implies that the entire third sphere of antitrust may be discarded. But it goes further than this. If the premise is followed, utilizing the Chicago assumptions, then the conclusion may be reached that the law should never be invoked.

As it is, Judge Easterbrook has argued that only unadorned price-fixing agreements among firms that together possess market power are worth prohibiting.³⁷ But even here, the case for prohibition is suspect. A price-fixing agreement will lead to higher prices, which will make new entry into the market attractive. If entry is easy, then the premises of the Chicago approach lead to the conclusion that any inefficient attempt to raise prices through collusion will fail and therefore will not be attempted.³⁸

Chicagoans do not typically assume free and instantaneous entry into markets.³⁹ Nonetheless, firms contemplating a price-fixing agreement will have to consider the cost of attracting new entry. Even if entry is not easy, a firm may be induced to incur the expense of coming into the market as a result of customers in the market agreeing to long-term contracts with the entrant.⁴⁰ This would lead to a significant loss of demand for the products of the colluding firms, a potential cost that, according to Chicagoans, the colluding firms would take into account in determining whether collusion would be profitable in the first place.

In addition, the issue is not simply whether the Sherman Act deters harmful price-fixing agreements; it is whether the benefits of deterrence are worth the costs of maintaining enforcement agencies and entertaining long-lasting and expensive lawsuits. It is not at all clear that any "core" of antitrust will remain after the Chicago approach is done with it.

The profit-maximization hypothesis is a more powerful tool than even the Chicagoans desire. In the absence of some countervailing principle that restricts its application to those situations where it is most appropriate, profit maximization consumes rather than focuses the law.

37. *Id.* at 39.

38. This shortcoming of the Chicago approach is developed in Donald Dewey, *Information, Entry, and Welfare: The Case for Collusion*, 69 AM. ECON. REV. 587 (1979).

39. See Easterbrook, *supra* note 12, at 33.

40. See *Predatory Strategies*, *supra* note 30, at 270-71.

This casts serious doubt on the legitimacy of the Chicago approach because it is difficult to argue that Congress meant to enact a statute based upon an explanatory principle that when rigorously applied leads to the conclusion that the statute can never be violated.

B. The Chicago School Approach as Social Policy

The economic approach teaches the importance of considering the unintended consequences of public policies—effects that ripple across society in ways that were neither anticipated nor desired. The Chicago School approach to antitrust has a number of implications that are unfortunate in light of the system of beliefs and values that underpins the structure of our social institutions.

1. A Theory That Runs Like Clockwork

The Chicago School approach is based on a sense of determinism that is inconsistent with the beliefs in free will and individual responsibility that animate our system of government. This sense of determinism is a consequence of economists' fervent belief that economics is more like physics than sociology.⁴¹ As Robert Bork noted, "Basic microeconomic theory is of course a science, though like many other sciences it is by no means complete in all its branches. Were it not a science, rational anti-trust policy would be impossible."⁴²

Different methods of sorting out existence lay claim to scientific status to the extent that they possess predictive power. A scientific approach assumes that if one understands the various forces at work at a specific point, one can predict the result of their interaction. If two atoms of hydrogen meet up with one atom of oxygen under specified conditions, they are always going to combine into one molecule of water. If they do not, and if their response is random in some significant sense, then chemistry would be a drama rather than a science.

If economics is a science, then economic behavior must be predictable. All individuals, whatever their background or idiosyncracies, must respond in the same way to the same economic stimuli. If we know the factors that they must take into account, then we will be able to predict their actions with certainty. The world of the Chicagoans is entirely deterministic.

41. Whitney Cunningham, Note, *Testing Posner's Strong Theory of Wealth Maximization*, 81 GEO. L.J. 141, 158 (1992).

42. THE ANTITRUST PARADOX, *supra* note 13, at 8.

In a deterministic world, procedural concepts such as fairness hold no meaning. The very idea of fairness assumes an indeterminacy of outcomes that is fundamentally inconsistent with the economic approach. When the result is preordained, there is no reason to be concerned about the process, just as it makes no sense to give freon a "fair chance" to freeze at the same temperature as water.

Those under the sway of the economic approach have considerable difficulty even grasping the notion of fairness. For example, Judge Easterbrook's writings show that he is not quite sure what fairness means, but he knows he does not like it. Easterbrook implicitly admits that he does not understand the term to have meaning by invariably including it within quotation marks, the grammatical equivalent of holding the word as far from the body as possible, as if it were some sort of roadkill: "[Oliver] Williamson argues that rules against predation should assure 'fairness.' . . . This assumes that some amount of efficiency should be sacrificed to 'fairness' but does not specify how the trade is to be made, or why the antitrust laws are appropriate instruments for making such decisions."⁴³

When pushed for a definition, Judge Easterbrook appears to believe "fairness" is simply another word for not trying hard:

My brethren want rivalry to be "fair." . . . Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom?

. . . .

. . . When economic pressure must give way to fair conduct, as the court today holds it must, rivals will trim their sails. Fair competition is tempered competition.⁴⁴

Similarly, George Stigler has suggested that terms like "justice" and "fairness" are just weasel words that can mean anything anyone wants. To him, the lawyer's concept of fairness is "a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice."⁴⁵

The problem with endorsing this "scientific" and deterministic approach as a foundation for the formation of public policy is not just that

43. *Predatory Strategies*, *supra* note 30, at 266 n.12 (citations omitted).

44. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., concurring in part and dissenting in part).

45. George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1, 4 (1972); *see also* 1 PHILLIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW* 21 (1978) ("As a goal of antitrust policy, 'fairness' is a vagrant claim applied to any value that one happens to favor.").

it renders the concept of fairness incomprehensible. It is also irreconcilable with the animating ideas of our system of government.

One can argue on a philosophical level about whether we truly exercise free will in a meaningful sense and whether the concept is a useful one for the purpose of constructing theories of behavior.⁴⁶ But the issue is foreclosed as far as public policy is concerned. We have based our system of government on the idea that each individual is entitled to dignity, autonomy, and formal equality because each of us is capable of exercising free choice. Consequently, each of us is responsible for the choices that we make.

It is as incongruous to overlay upon this system an approach to an area of law based on determinism as it would be to attempt to incorporate into Newtonian physics a theory based on the premise that objects decide for themselves how fast they will fall to earth. The jarring incompatibility of the premises of the Chicago School with those generally underlying our political system seriously compromises any claim of historical or political legitimacy of the approach.

2. Endangering Entrepreneurs

The absence of concern for the direct victims of allegedly anticompetitive actions is a distinguishing feature of the economic approach. It is also bad economic policy. Our system depends upon the infusion of new ideas, capital, and energy that entrepreneurs bring to their fledgling ventures: Schumpeter's continuous gale of creative destruction.⁴⁷ As a general matter, those entrepreneurs respond to signals and incentives, as economics teaches. One of the more powerful signals our system can send is that success is possible for anyone, that success or failure will be determined by the impersonal forces of the market, rather than by the desires or whims of the more powerful. This message is an energizing one:

America is strongest when it is most open and optimistic. This sounds like a platitude, but it has important practical effects. When ordinary people believe they have a fair chance, they usually do their best, and the whole country benefits from their efforts. The interests of individual Americans are well matched to

46. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 171-90 (1990) (discussing the utility of a concept of free will in jurisprudence).

47. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 84 (George, Allen & Unwin Ltd. 1976) (1942).

the society's collective good. But if Americans think they are trapped, cheated, stuck, or doomed, most of them do not try.⁴⁸

The message that the avenues of opportunity are open implicitly promises that competition will be fair and that the results of competition will be respected. Fairness is a procedural concept. It consists of guaranteeing an equal opportunity to all those who seek to participate in a particular undertaking. Our political system places a high value on procedural fairness because our beliefs in free will and responsibility assign a distinct value to achievement. Furthermore, our faith in the variability of human outcomes means that we will be unable to predict achievement before it manifests itself as a result of a fair competitive process.

Competition under conditions of fairness is a ratifying process. The competitors who achieve success thereby prove that they deserve it. It follows that winners should be entitled to enjoy the fruits of their success. The prospect of enjoying the earned and deserved rewards of success helps drive our system by supplying powerful incentives for entrepreneurs and thereby generating a constant infusion of new energy and ideas.

The economic approach to antitrust tosses all of this overboard. Because the approach assumes that results are preordained, it perceives no reason to be concerned about the fairness or legitimacy of the competitive process. What is worse, the absurdly tolerant concept of efficiency that the approach champions generally results in the ratification of acts of depredation by powerful businesses against new and far more vulnerable competitors.

This policy is destructive because it increases the risk of entrepreneurial activity. Once the law abandons its role of protecting the fairness and legitimacy of the competitive process, that process becomes more prone to random acts of anticompetitive violence. Such a policy discourages the entrepreneurial activity necessary to stoke the furnaces of the economy.

3. Jury Avoidance

The Chicago School approach also leads to increased reliance on summary judgment and other ways of resolving lawsuits by judges rather than juries. This antidemocratic tendency squanders the beneficial attributes of our jury system.

48. JAMES FALLOWS, *MORE LIKE US: MAKING AMERICA GREAT AGAIN* 185 (1989).

For many years, briefs of antitrust plaintiffs opposing motions for summary judgment contained ritual invocations of *Poller v. CBS*.⁴⁹ In *Poller*, the Supreme Court reversed a grant of summary judgment to defendants in an antitrust case. The plaintiff built its case upon a far-fetched theory that CBS had joined in a conspiracy to destroy the value of a UHF television station in Milwaukee. In language that many antitrust attorneys could recite by heart, the Court explained:

We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."⁵⁰

In the thirty years since *Poller*, judicial attitudes toward summary judgment in antitrust cases have taken a 180-degree turn. Today, cases are routinely dismissed before trial.⁵¹ Reflecting the change that was apparent by 1987, the Seventh Circuit Court of Appeals stated that "summary judgment should be a favored practice in antitrust cases."⁵² Former Federal Trade Commissioner Terry Calvani describes the movement away from *Poller* as "a phenomenal change."⁵³ According to Calvani, "for 'real world' lawyers with 'real world' clients, the demise of the *Poller* Doctrine may be the single most important antitrust development in twenty years."⁵⁴

This dramatic reversal in approach has been driven by courts' increasing acceptance of Chicago theories. The seminal case in the area is *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*⁵⁵ The plaintiffs

49. 368 U.S. 464 (1962).

50. *Id.* at 473 (footnote omitted).

51. See Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1129 (1986). The article is an outgrowth of the Georgetown study of private treble damage litigation. According to Robert Pitofsky, "The most striking finding of the Georgetown study is that judges are today granting summary judgment and motions to dismiss far more frequently than in recent years." Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 833 (1987).

52. Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 660 n.4 (7th Cir.), cert. denied, 484 U.S. 977 (1987).

53. Terry Calvani, *Future Direction of Antitrust Law Enforcement*, 29 WASHBURN L.J. 364, 365 (1990).

54. *Id.*

55. 475 U.S. 574 (1986). *Matsushita* extended an approach evident in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). *Matsushita*, 475 U.S. at 593-95.

alleged that a number of Japanese manufacturers had conspired to drive American firms from the market for television sets in the United States by charging predatorily low prices. The Court relied on Chicago scholarship for the proposition that "predatory pricing schemes are rarely tried, and even more rarely successful."⁵⁶

Sympathetic to the Chicago premise that firms do not often behave contrary to the teachings of economic theory, the Court announced a challenging evidentiary standard: "[I]f the factual context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."⁵⁷

Matsushita established an attitude more than a workable rule. The Court did not explain how lower courts should determine whether a plaintiff's evidence is sufficiently "more persuasive" to survive a summary judgment motion. Nevertheless, lower courts have recognized and put to their own uses the tone of hostility to antitrust claims that permeates the Supreme Court decision.

The Supreme Court's recent decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*⁵⁸ represents a step in the other direction. There, the Court cautioned that no different standards for summary judgment are applicable in the antitrust field and that lower courts should not be quite so eager to dismiss antitrust claims. *Kodak* is significant because it runs counter to a strong and rising tide in favor of minimizing the role of juries in antitrust cases. Indeed, Donald Turner, formerly in charge of the Antitrust Division of the Department of Justice and a respected scholar, has recommended that in antitrust cases jury trials be abolished all together.⁵⁹

Trial by jury plays a key role in our system of justice. From the perspective of the juror, jury service represents, next to voting, the individual's most direct participation in our process of governance. The jury system reinforces notions of social equality in a very effective way. Every juror's vote counts and every vote counts the same.

The jury system also fosters our belief in a common set of values and moral principles. Verdicts are reached not on the basis of academic theorizing but as a result of a group of people sitting around a table and

56. *Matsushita*, 475 U.S. at 589.

57. *Id.* at 587.

58. 112 S. Ct. 2072 (1992).

59. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 812-14 (1987).

hashing out individual differences until a consensus is reached. This model of decision-making recognizes that we do share common values and can undertake a meaningful dialogue with others from different walks of life and different life experiences.

From the perspective of the litigants, the jury system is an effective ameliorative institution. Those involved in lawsuits tend to believe that their disputes are important enough to command serious social attention. The witnesses will testify, the parties will have a chance to tell their stories, and a jury drawn from the community will undertake the solemn task of reaching a verdict. The trial process frequently entails a beneficial purgative effect for the litigants, who seek the assurance that their concerns are treated seriously and considered fairly, wholly apart from their desire for the outcome they seek.⁶⁰

There is value in the process both for the jurors and the litigants, which helps make the jury system a critical institution for fostering civic virtue. The distrust of this system evident in the economic approach to antitrust and the movement toward a system more akin to administrative law for resolving these claims is antidemocratic, reflecting a distrust of both the citizens sitting on juries and of the informal, consensus-building model of decision-making that the jury system embodies.

4. Speaking in Tongues

Another limitation of the economic approach is that it is premised upon the futility of a meaningful dialogue on values and denies the moral dimension our laws can embody. The economic approach proceeds from the premise that the explosion in diversity that can be a source of our national strength has also resulted in a babel of conflicting and confusing moral dialects precluding the achievement of a moral consensus.

Rejecting the possibility of social agreement on values, the economic approach retreats to a logic of locating value solely in individual consumption choices. To the economist, an object has value only to the extent that a particular individual is willing and able to acquire it. Whatever commands the highest price automatically possesses the greatest value. Consistent with this view, the purpose of the law is to maximize value in the sense of preserving a system whereby goods gravitate to their highest valued uses.

60. Posner has recognized this point. POSNER, *supra* note 46, at 206.

The economic approach can lead to results that many of us find morally repugnant. For example, Chicagoans tolerate, indeed applaud, an efficient firm using any means at its disposal to drive a less efficient firm out of business. As Judge Easterbrook has written, "If there will be but one survivor, the better to be quick about getting there."⁶¹ Within certain constraints, those subscribing to the economic approach to antitrust are willing to equate the law of the market with the law of the jungle.

Most of us have higher expectations than that for the standards of conduct demanded by our laws. However, when decision-making is based exclusively on economic principles and thus handed over to the priesthood of economists, opposition to an antitrust rule based on non-economic values simply does not register. It is like objecting to the answer to a geometry problem on moral grounds.

There is no reason to embrace policy that may lead to results that most people find distasteful. The law would be improved if it contained a workable method of addressing the dissonance that results when rules of law are inconsistent with widely shared concepts of right and wrong. The balance of this Article explains how this might be accomplished.

III. RECLAIMING THE SOUL OF ANTITRUST

A. Introduction

It is not enough to point out flaws in the Chicago School approach. To have practical value, a critique must be coupled with an alternative approach that is more faithful to our values and institutions as well as more appropriate to all three spheres of antitrust. The alternative must entail more than lofty rhetoric about other values and goals, with the details left for later. Identified goals must translate into workable rules—rules that are specific, sensible, consistent, comprehensive, and applicable by busy judges trying to manage overloaded dockets. It is not sufficient to tell the courts to take all relevant factors into account and then to walk away with a sense of relief over having solved *that* problem.

Proposed rules for resolving legal disputes should be formulated with one eye on the practical limitations of the litigation process. The Chicago School approach is successful in large part because it is based on economic principles that are simple enough to be manageable.

Some commentators criticize the Chicago approach because its theoretical apparatus is underdeveloped. These critics believe that the law

61. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 573 (7th Cir. 1986) (Easterbrook, J., concurring in part and dissenting in part).

needs more economics, not less. Accordingly, different approaches to antitrust problems are proposed that incorporate more sophisticated and complex theories. Such proposals may be useful if they are offered to justify per se rules of legality or illegality. However, to the extent that the proposals suggest that legality should turn on a number of identified economic factors, they are likely to be a waste of time. It does not matter how much more accurate such proposed rules are in a theoretical sense. They quickly move the laws to a plane of abstraction beyond the interests of busy judges. As an institutional matter, courts have a low tolerance for complexity in the legal rules they must apply.⁶²

Once the shortcomings of the economic approach are recognized, the next step in revitalizing antitrust is identifying a goal that has sufficient historical legitimacy and content to be capable of counterbalancing economic efficiency. To explain why competitive fairness should be the goal, the next section of this Article reviews the political history of antitrust from the Civil War to World War I. The following section attempts to develop the concept of competitive fairness in a way that leads to workable rules that accommodate fairness and efficiency.

B. The Role of Fairness in the Politics of Antitrust

The nature of business competition became a significant political issue during the latter half of the nineteenth century because there suddenly was so much of it. A convergence of technological developments, including expansion of the railroads and dramatic improvements in communications capabilities, fueled the rapid growth of markets. The harnessing of electrical power and development of larger and more specialized machinery, operated by workers from the plentiful labor pools in the growing urban centers, enabled firms to meet the needs of

62. Perhaps the best example of how academic theorizing can quickly become irrelevant to practical decision-making is the dispute about the appropriate test for identifying predatory pricing. See, e.g., Phillip E. Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); F.M. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977). Many scholars recommended tests for predatory pricing based on comparisons of prices to particular measures of costs. Regardless of their logic, these tests require plaintiffs to analyze defendants' prices and costs in ways that are nearly always beyond the capacities of the litigation process. Courts would have a very difficult time utilizing any price-cost test in a meaningful way. On the other hand, the Chicago School view is that, by and large, predatory pricing is simply not worth worrying about. See *Predatory Strategies*, *supra* note 30, at 264. This is the type of clear-cut conclusion that judges can put to use, as Judge Easterbrook has. E.g., *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1400-04 (7th Cir. 1989).

newly expanding markets. The result was business on a new scale and emerging competition that sometimes grew bareknuckled and raw. Firms that failed to adjust fell by the wayside while more adaptable enterprises grew at dizzying rates.

Many believed that unbuttoned rivalry led to overproduction and outbreaks of ruinously low prices. Cooperation often appeared a more reasonable and less destructive strategy.⁶³ Consequently, in the decade after the Civil War, competitors commonly entered into loose agreements to set prices. Because the temptation to cheat on such agreements proved irresistible to many, forms of combination grew increasingly formal and sophisticated. This process culminated in the creation of the Standard Oil trust in 1879. The forty-one investors in forty corporations that eventually formed the Standard Oil trust surrendered their stock to the organizers of the enterprise, led by John D. Rockefeller, and received trust certificates and healthy dividends in return.⁶⁴ The Standard Oil trust form worked well and proved popular with corporate lawyers. As a result, many similar trusts were created to control the production and sale of dozens of commodities.⁶⁵

In a happy coincidence for the new trust barons, a social theory developed about this time holding that everyone able to earn a vast fortune at business endeavors deserved every cent they made and contributed far more to society by their efforts than they would ever be able to take out in wages and dividends. The doctrine was adapted from the theory of biological evolution developed in *On the Origin of Species*,⁶⁶ first published in 1857, and came to be known as Social Darwinism.

Herbert Spencer popularized Social Darwinism in the United States. In *Social Statics*,⁶⁷ first available in America in the 1860s, Spencer argued that society, driven by the pressure of subsistence, made slow, painful, and evolutionary progress as the result of the struggle that led to the survival of the fittest. This was not a cheery philosophy for those who lacked the gifts to prosper in society: "If they are sufficiently complete

63. See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 73-74* (1965).

64. BRUCE BRINGHURST, *ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890-1911*, at 12 (1979); HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 76-78* (1954).

65. WILLIAM W. COOK, "TRUSTS": *THE RECENT COMBINATIONS IN TRADE 51* (2d ed. New York, L.K. Strause & Co. 1888).

66. CHARLES R. DARWIN, *ON THE ORIGIN OF SPECIES* (New York, D. Appleton & Co. 1857).

67. HERBERT SPENCER, *SOCIAL STATICS* (New York, D. Appleton & Co. 1878).

to live, they *do* live, and it is well they should live. If they are not sufficiently complete to live, they die, and it is best they should die."⁶⁸

Spencer and others applied the same bleak analysis to the world of business. The competitive struggle had prompted the development of newer, larger, more complex and sophisticated forms of enterprise. The trusts, as the latest products of the evolutionary process, would inevitably prevail over their smaller, outmoded rivals, who would lumber off in the way of the brontosaurus.

The bleakness for the victims was matched by a sense of satisfaction for the victors. Those who ran the trusts would deserve their enormous fortunes. Their success would certify that they were the fittest of their breed, and their efforts would carry forward the progress that advanced the race.⁶⁹

Social Darwinist views represented a fundamental challenge to traditional American beliefs in equality and opportunity. Success became a consequence of inevitable development rather than individual initiative or skill. Because the result was predestined, there could be little objection to the trusts using any means to overcome their more traditional rivals and hasten the next stage of development.

The notion of fair competition lost its meaning. More traditional businessmen, who saw themselves as the victims of the trusts, were transformed from formally equal competitors with a realistic hope of success to the obsolete detritus of an evolving society.

The result was a clash of beliefs, as citizens grappled with what Martin Sklar has described as the corporate reconstruction of American capitalism.⁷⁰ The resulting social and political ferment inevitably washed into the halls of Congress. There the pressure built until it was first released in the 1890 passage of the Sherman Act and twenty-four years later in the passage of the Clayton Act and creation of the Federal Trade Commission.

The traditional view prevailed. Both the Sherman Act and the legislation of 1914 represent victories for those who saw business rivalry as an unpredictable contest among formally equal competitors and defeat for those who saw in the results of competition the inevitable outcome of an

68. RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 41 (rev. ed. 1959) (quoting SPENCER, *supra* note 67, at 414-15).

69. This was the thrust of Andrew Carnegie's most famous essay, *Wealth*, 1889 N. AM. REV. 42.

70. MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916* (1988).

evolutionary process. As a result, the antitrust laws define fair competition as the touchstone of legality and seek to preserve formal equality among competitors as the means by which fair competition may be preserved.

This purpose is apparent in the legislative history of the Sherman Act. Senator John Sherman's major speech in support of the legislation that came to bear his name, delivered on March 21, 1890, is generally recognized as the single most fruitful source for deducing congressional intent.⁷¹ Like any politician defending a novel proposal, Sherman started out by reassuring his colleagues that the bill embraced no revolutionary concepts. Next, in the most important language of the speech, Sherman described the purpose of the legislation: "This bill, as I would have it, has for its single object . . . to supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States."⁷²

Sherman's purpose was to hold trusts and combinations accountable to a federal standard designed to safeguard the "industrial liberty" of citizens. Sherman defined the term in a way that identified the bill's limiting principle:

It is said that this bill will interfere with lawful trade, with the customary business of life. I deny it. It aims only at unlawful combinations. It does not in the least affect combinations in aid of production where there is free and fair competition. It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges.⁷³

Thus, the limiting principle of the bill was the notion of "industrial liberty." The concept encompassed the right of every individual to work at any lawful vocation on equal terms with anyone else, large or small. This is the type of structured competition that underlies the concept of fairness. Congress intended trusts to be judged against this standard. According to Sherman, the "single object" of the bill was to empower the federal courts to protect the right of industrial liberty.⁷⁴

71. See THORELLI, *supra* note 64, at 226; Bork, *supra* note 16, at 45; May, *supra* note 26, at 289.

72. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

73. *Id.*

74. Until recently, the Supreme Court had regularly recognized this concept, variously described as the right of freedom to trade, competitive freedom, or economic liberty, as an

Many studies of the legislative history of the antitrust laws begin and end with the congressional deliberations on the Sherman Act. This narrow approach tends to neglect the broader political currents that pushed the issue onto the legislative agenda as well as developments from 1888 to 1914 when antitrust was most prominent as a political issue.

For example, the presidential campaign of 1912 and the subsequent antitrust legislation of 1914 illustrate how skillful evocation of its symbolic value could cause antitrust to resonate as an issue. It also reinforces the competitive fairness strain of the law and the unreality of attributing a concern for economic theory to the politicians responsible for the antitrust laws.

The Supreme Court's landmark 1911 decision in *Standard Oil Co. v. United States*⁷⁵ affirmed the lower court order splitting up the colossus. However, the decision also imposed a "rule of reason" gloss on the straightforward language of the Sherman Act. The rule of reason seemed to equip the generally conservative judiciary with an effective tool for ignoring the spirit of the statute. As a result, popular sentiment grew in favor of additional legislation to strengthen the law and spell out more precisely what practices were prohibited.

Sensing the vulnerability of incumbent William Howard Taft and Progressive candidate Theodore Roosevelt on this issue,⁷⁶ Woodrow Wilson made attacks on the trusts one of the centerpieces of his campaign. After his election, his speeches were gathered together in *The New Freedom*.⁷⁷ The book spells out the almost mystical belief in the common people that shaped Wilson's approach:

important goal of the antitrust laws. *E.g.*, *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); *Silver v. New York Stock Exch.*, 373 U.S. 341, 359-60 (1963); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), *overruled by* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 42 (1930); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 376 (1923); *Ramsay Co. v. Associated Bill Posters of the United States & Can.*, 260 U.S. 501, 512 (1923); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

75. 221 U.S. 1 (1911).

76. Although Taft's Justice Department filed many significant antitrust cases, his view of the law reflected an economic approach. See 1 WILLIAM H. TAFT, *PRESIDENTIAL ADDRESSES AND STATE PAPERS* 54 (1910). Theodore Roosevelt had earned a reputation as a trustbuster. However, reflecting Roosevelt's desire to retain the support of some well-heeled financiers and businessmen, the Progressive Party adopted an antitrust plank that seemed to owe more to Social Darwinism than to the notion of equality of opportunity. RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 231 (1948); ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 374-81 (1946).

77. WOODROW WILSON, *THE NEW FREEDOM* (1913).

The treasury of America does not lie in the brains of the small body of men now in control of the great enterprises that have been concentrated under the direction of a very small number of persons. The treasury of America lies in those ambitions, those energies, that cannot be restricted to a special favored class. It depends upon the inventions of unknown men, upon the originations of unknown men, upon the ambitions of unknown men. Every country is renewed out of the ranks of the unknown, not out of the ranks of those already famous and powerful and in control.⁷⁸

According to Wilson, the genius of the American system was that it was set up to recognize and profit from the contributions of the unknown and the unheralded. It did this by fostering fair competition:

The reason that America was set up was that she might be different from all the nations of the world in this: that the strong could not put the weak to the wall, that the strong could not prevent the weak from entering the race. America stands for opportunity. America stands for a free field and no favor. America stands for a government responsive to the interests of all.⁷⁹

To Wilson, the American system of equal opportunity and fair competition unleashed the nearly limitless potential of the common man. This belief gave him a different perspective on the dangers that the trusts created. When success is possible for everyone, everyone works harder to succeed. Society prospers as the individual drive for advancement powers the engines of progress. But to the extent that the trusts blocked off the avenues of opportunity, the incentive for individual effort was diminished and society stagnated:

Do you not see that just so soon as the old self-confidence of America, just so soon as her old boasted advantage of individual liberty and opportunity, is taken away, all the energy of her people begins to subside, to slacken, to grow loose and pulpy, without fibre, and men simply cast about to see that the day does not end disastrously with them?⁸⁰

From Wilson's perspective, America had a problem. The trusts were squeezing out the small men on the make, the backbone of the country, and if the trend continued, the American people would be transformed from eager and ambitious workers into sullen drones, "pulpy" and "without fibre."

78. *Id.* at 17-18.

79. *Id.* at 221.

80. *Id.* at 291.

Politicians are in the business of promising solutions, and Wilson had one to offer. He described the "monopolistic methods" that he proposed to prohibit:

[T]here must be no squeezing out of the beginner, no crippling his credit; no discrimination against retailers who buy from a rival; no threats against concerns who sell supplies to a rival; no holding back of raw material from him; no secret arrangements against him. All the fair competition you choose, but no unfair competition of any kind.⁸¹

After winning passage of bills reducing the tariff and establishing the federal reserve system, President Wilson delivered a special message on trusts and monopolies before a joint session of Congress on January 20, 1914. Wilson's proposals and others were incorporated into four bills introduced in the House of Representatives by Congressman Clayton, Chairman of the Judiciary Committee. After much debate and amendment, the various proposals became the Federal Trade Commission Act and the Clayton Act of 1914.

Because the 1914 legislation was initiated by Wilson and closely tracked his proposals, a natural conclusion is that the statutes were intended to foster the same goal of competitive fairness that Wilson embraced in his campaign speeches. This conclusion is fortified by the frequent declarations during congressional deliberations that the purpose of antitrust law in general and the proposed legislation in particular was to guarantee free and fair competition to business entities large and small.⁸²

Neither the supporters of the legislation nor virtually anyone else in Congress approached the legislation from a perspective based on economic theory. Indeed, it appears that only one member, Representative Fess, claimed any knowledge of economic theory during the Clayton Act deliberations. He stated: "As a student for some time of the subject of concentration and control, as set forth by the investigations of Dr. Van Hise, Bruce Wyman, and a great number of experts, such as Dr. Ripley, Prof. Jenks, and Prof. Ely, I have well-defined convictions."⁸³ His convictions led him to denounce the whole approach of the Clayton Act as

81. *Id.* at 173.

82. *See, e.g.*, 51 CONG. REC. 9155-56 (1914) (statement of Rep. Bailey); *id.* at 9184 (statement of Rep. Helvering); *id.* at 9196-97 (statement of Rep. Taggart); *id.* at 9273 (statement of Rep. Carlin); *id.* at 9410 (statement of Rep. Mitchell); *id.* at 14,326 (statement of Sen. Chilton); *id.* at 15,867 (statement of Sen. Reed); *id.* at 15,949 (statement of Sen. Borah); *id.* at 16,341 (statement of Sen. Gray).

83. *Id.* at 9697.

unsound. He was one of fifty-four Representatives who voted against passage of the original version of the bill.⁸⁴

More typical was the rough-and-ready approach of Senator Reed, who quoted with hearty approval "Champ" Clark's thoughts on a proper antitrust enforcement policy: "If I had my way, I would fill the penitentiaries and jails of the United States so full of trust magnates that their arms and legs would stick out of the windows."⁸⁵

In a speech before the American Electric Railway Association on January 29, 1915, President Wilson offered a revealing description of the purpose behind the Clayton and Federal Trade Commission Acts. Wilson stated that it had been difficult to develop statutory definitions for business competition, to remove the uncertainties, and to define what was prohibited. He congratulated Congress for its efforts to do so in the recent legislation and spoke in unmistakable metaphorical terms about what Congress had accomplished:

Business does not want, and ought not to ask for, more liberty than the individual has; and I have always in my own thought summed up individual liberty, and business liberty, and every other kind of liberty, in the phrase that is common in the sporting world, "A free field and no favor."

....

I think it is a serviceable figure. It means this: That you are not going to be barred from the contest because you are big and strong, and you are not going to be penalized because you are big and strong, but you are going to be made to observe the rules of the track and not get in anybody's way except as you can keep ahead of him by having more vigor and skill than he has.⁸⁶

After passage of the Clayton Act, World War I captured the national spotlight, and antitrust never again became as potent a political issue. The two later substantive amendments to the antitrust laws—the Robinson-Patman Act of 1936⁸⁷ and the 1950 Celler-Kefauver amendments to section 7 of the Clayton Act⁸⁸—were intended to tighten the laws and represented no break from the legislative attitudes embodied in the

84. *Id.* at 9911.

85. *Id.* at 15,862 (statement of Sen. Reed).

86. Woodrow Wilson, Address to the American Electric Railway Association (Jan. 29, 1915), in 1 THE MESSAGES AND PAPERS OF WOODROW WILSON 101, 101-02 (Albert Shaw ed., 1924).

87. The Robinson-Patman Act of 1936, ch. 592, 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13 (1988)).

88. Celler-Kefauver Act of 1950, ch. 1184, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18 (1988)).

Sherman and Clayton Acts. The meaning and purposes of the antitrust laws are still to be found in the political history of the quarter-century from 1888 to 1914 when antitrust ranked highest on the national agenda.

Deducing the spirit behind the antitrust movement of a century ago, of course, does not necessarily tell us what the laws mean today. As the careful legal scholarship that has explored the origins of the Sherman Act has made clear, the law was very much a product of its time.⁸⁹

The sentiment behind the law owes much of its strength to the classic liberal concern about the coercive threat to others inherent in the possession of power.⁹⁰ The antitrust movement was also fueled by the traditional republican belief that civic virtue is the product of a society comprised of independent, self-sufficient workers engaged in enterprises of roughly equal size.⁹¹ Finally, the formative years of antitrust were shaped in important part by what James May has described as "a powerful, widely shared vision of a natural, rights-based political and economic order that simultaneously tended to ensure opportunity, efficiency, prosperity, justice, harmony, and freedom."⁹²

This scholarship underscores how far we have come since that time. The challenge is to learn what lessons the political history of antitrust law teaches for today. An appreciation of its history requires that we recognize the part of the background that is historically contingent, a product of its times. More important, we must also identify those core beliefs that inspired passage of the Sherman Act and legislation of 1914 and still retain their vitality today.

The antitrust laws grew out of a concern for competitive fairness. Fairness is a concept derived from our beliefs in free will, responsibility, autonomy, equality, and the indeterminacy of outcomes. While we no longer believe in natural law, or feel quite the same way about a nation of yeomanry, or fear that large business entities will invariably swallow up the government and suffocate individual initiative, we still have very strong (though frequently inarticulate) feelings about fairness. To the extent that antitrust laws further what we consider to be fair, they vindicate their purpose and reinforce our values.

89. *E.g.*, Hovenkamp, *supra* note 26, at 1065; May, *supra* note 26, at 391-95; Millon, *supra* note 26, at 1291; Scherer, *supra* note 26, at 255.

90. Millon, *supra* note 26, at 1236.

91. *Id.* at 1242-43.

92. May, *supra* note 26, at 391.

C. From Theories to Rules

1. Defining the Structure of Fairness

In devising an approach to antitrust more faithful to its roots and aspirations, the identification of competitive fairness as an important goal is the easy part. What is more challenging is developing a set of rules that incorporate fairness and efficiency and lead to principled and predictable decision-making.

What do we mean when we talk about fairness? And under what circumstances are legitimate claims of fairness likely to be invoked?

Fairness is a procedural concept derived from the principles of equality and autonomy. Its concerns may generally be summed up as equality of opportunity. In the antitrust context, it finds meaning in the recognition of the rights and responsibilities of individual competitors. The concept can be approached from four perspectives: the beginning conditions for the competition, the competition itself as viewed from the perspective of the firm, the competition as viewed from the perspective of the market, and the consequences that flow from the results of the competition.

The first perspective encompasses conditions preceding actual market competition. Fairness dictates that, in general and within reason, all firms are entitled to equal treatment in obtaining and utilizing the various inputs that go into the final product or service offered. This idea is grounded in equality and is equivalent to saying that all competitors should begin at the same starting line.

The categories of antitrust claims that can invoke this component of fairness include tie-in agreements, boycotts, exclusive dealing arrangements, and price discrimination. With a tie-in, a firm is compelled to purchase a product that it does not want. Boycotts and exclusive dealing arrangements can prevent a firm from purchasing products that it wants. And price discrimination forces a disadvantaged firm to pay more for its products than its rivals when the difference in prices does not simply reflect a supplier's different costs of doing business. In all four cases, the practices are unfair because they saddle the victimized firm with an artificial handicap that can impede its ability to compete in the market on equal terms with its rivals.

One view of how this first dimension of fairness has helped shape the Robinson-Patman Act was expressed by Earl W. Kintner, a leading advocate and scholar of the statute, in 1976 congressional testimony:

[The] Act basically provides for equality of opportunity among competing customers or purchasers of a product. There is noth-

ing particularly obtuse about that; it is a very simple moral code, in my opinion, that people should be treated fairly. . . . There is no purpose in the Robinson-Patman Act to protect the inefficient, ineffectual businessman, large or small, but only to provide businesses with equality of opportunity so that they can start the race, the competitive race, on some basis of equality.⁹³

This component of fairness also appeared to supply the basis for the Supreme Court's decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*⁹⁴ Klor's, an independent retailer in San Francisco, was located next door to one of the stores in the Broadway-Hale chain. Klor's claimed that Broadway-Hale and "[ten] national manufacturers and their distributors" conspired "either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms."⁹⁵ The Supreme Court characterized the alleged boycott as a per se violation of section 1 and 2 of the Sherman Act, in large part because it "takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products."⁹⁶

The second component of fairness pertains to the competition itself. Within the range legitimately available to them, all firms are entitled to choose for themselves the strategies they adopt to meet the competitive challenge. This idea is grounded in autonomy and derives from the notion that firms should be free to chart their own course since they have to live with the results.

The major categories of antitrust claims that can invoke this component of fairness consist of the full panoply of selling restrictions: resale price maintenance, location clauses and other territorial restrictions, promotional requirements, customer restrictions, and the like. If these restrictions are uniformly applied and freely agreed to, there is no unfairness because the firm's autonomy has not been infringed. They are unfair, however, when they are unilaterally imposed through the exercise of superior bargaining power or opportunistic behavior after the relationship has begun. In this situation, they rob the victims of their autonomy—their right to choose the competitive strategies that will determine their success.

93. *Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the House Comm. on Small Business*, 94th Cong., 2d Sess., pt. 1 at 260, 262 (1976) (testimony of Earl W. Kintner).

94. 359 U.S. 207 (1959).

95. *Id.* at 208-09.

96. *Id.* at 213.

The third component of fairness also pertains to the process of competition. All firms are entitled to have their offerings considered objectively and to receive the unbiased verdict of the marketplace. This idea is also grounded in autonomy. It recognizes that while some competitors will fail, those that do should be determined by the impersonal forces of the market rather than by the exercise of a kind of power that displaces the market's rewards and punishments.

Predatory pricing is one of the categories of antitrust claims that implicates this component because it can lead to a market success or a market failure that is unjustified in terms of a firm's costs and relative efficiencies and thus interferes with competition on the merits. Also included are the same buying restrictions that are relevant to the first component, though here the emphasis is on the effects that such restrictions have on a firm's potential customers rather than a firm's own right to choose what products it will purchase. Tie-ins and exclusive dealing arrangements are unfair from this perspective because they foreclose the potential customers who are subject to the restrictions from freely considering the competitive merits of the products offered by other firms seeking to compete in the market. They are unfair because they interfere with the right of those firms to receive the unbiased verdict of the marketplace.

The final component of fairness pertains to the outcome of the competition. All firms are entitled to rewards commensurate with their level of success in the market. This idea is grounded in equality and comprehends the basic notion that clear results fairly arrived at should be respected.

This final component of fairness entails the protection of legitimate expectations. It is consistent with the precept that rules should not be changed in the middle of the game. For example, if a dealer competes effectively and prospers, it generally should not find itself terminated by its supplier. As Judge Learned Hand stated about monopolization: "The successful competitor, having been urged to compete, must not be turned upon when he wins."⁹⁷

Something akin to this component may have been at work in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*⁹⁸ and *Eastman Kodak Co. v. Image Technical Services, Inc.*⁹⁹ Both decisions are hard to square with the Chicago approach. What is distinctive about the cases is that in both

97. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

98. 472 U.S. 585 (1985).

99. 112 S. Ct. 2072 (1992).

a powerful firm permitted rivals to compete and prosper in related markets and then pulled the rug out from under them.¹⁰⁰ In this context, an ounce of victim is often worth a pound of theory. Because it is often implicated when plaintiffs have a compelling story to tell, the fourth component of fairness has a prominent role to play in any more encompassing approach to antitrust.

2. Developing the New Rules

We know what the Chicagoans mean when they talk about efficiency. We now have a better idea of what fairness means. How should courts balance the two when they are confronted by real parties with real disputes?

The first step is to assess the relative strength of the fairness concerns that are raised by the actions challenged in the lawsuit. The foregoing discussion demonstrates that a court need not resort to ad hoc intuitions of right and wrong in compiling the fairness side of the ledger. Instead, the court can compare that alleged to be unfair with the four components of fairness. Do the challenged actions equip a rival with an advantage attributable to factors outside the boundaries of the competitive arena? Do they rob the plaintiff of its right to choose its own competitive strategy? Do they prevent the plaintiff's offerings from being evaluated impartially by its potential customers? Do they interfere with the plaintiff's right to enjoy rewards commensurate with the verdict of the marketplace?

If the answer to any of these questions is yes, then a genuine fairness claim has likely been asserted. If the actions complained of caused the plaintiff damage, then its claim is entitled to consideration. If the answer to all four questions is no, then it is likely that the plaintiff was only a victim of the competitive process, which is unfortunate from the plaintiff's perspective but not a problem that antitrust law remedies.

100. In *Aspen Skiing*, the defendant, which had come to control three of the four major skiing facilities in Aspen, refused to continue to participate with the owner of the fourth facility in offering a popular six-day all-Aspen ski ticket and took additional actions that made it difficult for the owner of the fourth facility to market its own multi-area package to replace the joint offering. The Supreme Court affirmed a jury verdict in favor of the monopolization claim of the owner of the fourth facility. *Aspen Skiing*, 472 U.S. at 610-11.

In *Kodak*, Kodak adopted policies to prevent independent service organizations from obtaining replacement parts for Kodak copying equipment, with the apparent intent of driving from the market the independent firms that had sprung up to provide service for the equipment. The Supreme Court ruled that Kodak was not entitled to summary judgment dismissing the monopolization or unlawful tie-in claims of the independent firms. *Kodak*, 112 S. Ct. at 2092.

If the plaintiff presents a legitimate fairness claim, then the court must determine whether there is a genuine conflict between the relevant fairness and efficiency considerations. Often there is not. Cartels probably provide the best example. Bork states that a per se rule against cartel agreements promotes efficiency since "it necessarily implies a legislative decision that business units should prosper or decline, live or die, according to their abilities to meet the desires of consumers."¹⁰¹

The rule of per se liability is also consistent with preservation of the opportunity to compete on fair and equal terms; it prohibits private agreements that attempt to circumvent the judgment of the market. The rule engenders confidence that those who succeed deserve their success. An antitrust challenge to a horizontal agreement thus presents no conflict that requires balancing. The efficiency goal suggests that the combination should be illegal and the fairness goal likewise points to condemnation.¹⁰² As a result, recognition of competitive fairness as a legitimate concern of antitrust law should not result in significant changes in the first sphere of antitrust.

Competitive fairness likewise does not have a major role to play in antitrust's second sphere. For example, challenges to mergers do not present difficult balancing problems because in general mergers do not properly raise fairness concerns. A merger may endow the surviving firm with sufficient market power to exercise monopoly power. The exercise of that power to distort the competitive process would violate the fairness ideal; the mere possession of the power would not. Indeed, if all of the firms in a market voluntarily agreed to a merger, leaving the resulting entity with a 100% share, there would be no problem from the perspective of fairness, because no competing firm is victimized. Under this approach, regulation of mergers should be governed by a sensible efficiency analysis.

There are areas in the third sphere of antitrust where fairness and efficiency concerns conflict. Resolving such conflicts is difficult. Bork is correct in concluding that the authors and original supporters of the antitrust laws did not foresee the dilemma.¹⁰³ The supporters of the Sherman Act viewed the values they identified in their deliberations as

101. THE ANTITRUST PARADOX, *supra* note 13, at 67.

102. See Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 425 (1965) ("Since the various antitrust objectives tend to converge in this instance, the blanket condemnation of cartels is perhaps the most solidly based of all antitrust concepts.").

103. Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985).

complementary and mutually reinforcing.¹⁰⁴ Thanks to the analytical work of the Chicagoans, the extent to which the values may conflict has been forcefully driven home.

When a genuine conflict exists, courts need not simply choose one value over the other in the abstract. Instead, the challenge is to formulate rules for decision that incorporate burdens of proof and other evidentiary requirements based on a sensitive assessment of the strength of the competing fairness and efficiency claims. Such rules should focus the inquiry on the material issues, impose evidentiary burdens on the party best able to discharge them, leave room for the jury to resolve factual disputes, and result in variable outcomes depending on the persuasiveness of the evidence.

Formulation of the rules requires critical assessment of the relative strength of the competing claims in particular contexts. However, once they are fashioned, courts may apply the rules to decide cases without a constant need to re-examine first principles. Outcomes may be somewhat less predictable under a more encompassing approach than under the Chicago School regime, but the task of judicial decision-making will be no more difficult than in any other area of the law where competing values shape the inquiry.

Dealer termination cases illustrate how this process might work. Price-cutting dealers are sometimes terminated by their suppliers after complaints from rival dealers about low prices. Beginning in the 1970s, many terminated dealers brought claims under section 1 of the Sherman Act, charging that their terminations were the result of illegal conspiracies between their suppliers and the complaining dealers.¹⁰⁵

Courts struggled with these cases because liability seemed to turn on the motivation of the supplier, which is extremely difficult to prove. In *Business Electronics Corp. v. Sharp Electronics Corp.*,¹⁰⁶ the Supreme Court cleared up the ambiguities in the law by adopting close to a pure Chicago School approach to the issues.

104. May, *supra* note 26, at 299.

105. See, e.g., *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1209-11 (4th Cir.), *cert. denied*, 464 U.S. 894 (1983); *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1232 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 985-86 (8th Cir. 1982), *aff'd on reh'g*, 712 F.2d 1238 (8th Cir.), *cert. denied*, 466 U.S. 931 (1983); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1192-95 (6th Cir. 1982); *Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946, 946-47 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 108 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Trabert & Hoffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 479 (7th Cir. 1980); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 165 (3d Cir. 1979).

106. 485 U.S. 717 (1988).

The Court stated that the termination of a price-cutting dealer at the insistence of a rival dealer, standing alone, does not necessarily result in a reduction of competition and a decrease in output. Instead, the Court thought that such a termination might plausibly be explained as a way of protecting the complaining dealer from free riding by its price-cutting rival and as a way of ensuring that the complaining dealer could afford to provide the kind of presale services that the manufacturer thought desirable.¹⁰⁷

The Court agreed with the Fifth Circuit that an agreement between a manufacturer and one of its dealers to terminate another of its dealers because of its low prices is not per se illegal unless the manufacturer and complaining dealer also have an agreement on price or price levels.¹⁰⁸

From a fairness perspective, *Business Electronics* is a perverse decision. Permitting a more powerful dealer to force a manufacturer to terminate another dealer because of its low prices violates the fourth component of fairness. It prevents the terminated dealer from having its success determined by how well and efficiently it satisfies the demands of its market and empowers another dealer to control its competitive fate. This violates the concept of autonomy that underlies the notion of fairness. This is an area that triggers a strong and deeply intuitive feeling that the law simply is not fair.

A genuine conflict between the claims of fairness and efficiency may seem present here. But requiring that each claim be backed up by evidence could go a long way toward untangling the conflict in particular situations.

As long as it acts in an even-handed manner, a supplier does not act unfairly by terminating a dealer that has not lived up to its obligations, even if the dealer offers lower prices. Similarly, it is not efficient for a supplier to terminate a discounting dealer that is complying with the terms of its distribution agreement in order to assuage a more powerful dealer that is displeased with the prospect of price competition. Which scenario more accurately describes the situation that has prompted litigation should be up to the parties to prove.

The law frequently structures the presentation of evidence in this sort of situation through formulation of a rule of decision that incorporates a shifting proof scheme. Each party is assigned responsibility for producing evidence supporting the value it invokes in the litigation. The rule

107. *Id.* at 724-25.

108. *Id.* at 735-36.

identifies the plaintiff's initial burden and establishes how the evidentiary responsibilities shift as the case progresses.

One of the best-known examples of this process has emerged in the employment discrimination field as an outgrowth of *McDonnell Douglas Corp. v. Green*.¹⁰⁹ A similar approach may be appropriate here. Following the *McDonnell Douglas* paradigm, a plaintiff dealer claiming that it was terminated pursuant to an illegal agreement between its supplier and one or more rival dealers might first be required to establish a prima facie case that the termination was the result of an anticompetitive agreement.

The plaintiff could establish its prima facie case by offering evidence that it was terminated after complaints about its low prices from other dealers and that there was no obvious shortcoming in its performance. Thus, the type of showing that the Supreme Court ruled insufficient to support a verdict in *Monsanto Co. v. Spray-Rite Service Corp.*¹¹⁰ would suffice to get the plaintiff over its first evidentiary hurdle.

If the plaintiff makes a prima facie case, then the burden of production (not proof) would shift to the defendant to articulate a permissible efficiency based justification for the termination. For example, the defendant could come forward with evidence that the plaintiff dealer was not providing the level of presale service that the supplier had required, but was free riding on the sales efforts of the complaining dealer. This step incorporates efficiency concerns into the proof scheme. However, rather than simply accepting an efficiency explanation as a matter of faith, the court would require the defendant to identify the basis for the theory and open the way for evidence on the issue.

If the defendant satisfies its burden of production, then the plaintiff must prove that the reason offered by the defendant is only a pretext for what was in reality a termination carried out pursuant to an anticompetitive agreement with the complaining dealer.¹¹¹

The jury will be confronted with competing explanations for the termination. The plaintiff will claim that it was terminated because the supplier responded to the complaints of a more powerful dealer that did not want to compete on price. The defendant will argue that the termination was caused by nothing more sinister than the plaintiff's contractual shortcomings. With the issue thus joined, the jury must decide whether the plaintiff discharged its burden of proof.

109. 411 U.S. 792 (1973).

110. 465 U.S. 752 (1984).

111. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

Following traditional conspiracy law concepts, the plaintiff should be required to prove more than the fact that complaints about prices were followed by termination. To this extent, *Monsanto* should remain good law. But the plaintiff should not be restricted in the ways it may go about proving its case. The terminated dealer should not be required to come up with the equivalent of an admission of the supplier that it had simply caved-in to the pricing complaints of another dealer. It may be enough, for example, for the dealer to prove that the supplier's proffered explanation is unworthy of credence.¹¹² Other methods of proof may be appropriate under the circumstances of the case.

Contrary to the holding in *Sharp*, there should be no requirement that the complaining dealer reached an agreement on prices with the supplier. Once the terminated dealer is recognized as an appropriate object of concern under antitrust law, there is no reason to require a further agreement on price as a way of locating the kind of effect on output that Chicago School advocates recognize as the only legitimate basis for antitrust liability.

The value of this approach to dealer termination cases is that it establishes as wrongful a termination prompted by a rival dealer's complaints about low prices. It affirms the idea of autonomy that underlies the concept of competitive fairness. At the same time, the approach recognizes efficiency justifications for the termination of even low-price dealers. It simply requires the supplier to articulate them, which seems reasonable since the supplier is the one that best knows the reasons for the termination. The dealer is relieved of the unnatural burden of producing evidence that is uniquely within the supplier's control. This approach, based on shifting burdens, establishes a proof scheme that is far more compatible with the search for truth than the theoretical framework of questionable but nonrebuttable presumptions that characterizes the law today.

112. In *Burdine*, the Supreme Court explained that in the employment discrimination context, a plaintiff can prove that the employer's nondiscriminatory explanation for its actions is a pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. In *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993), the Court explained that the fact-finder's rejection of the employer's explanation for its adverse employment action affecting the plaintiff *permits* but does not *compel* a finding of discrimination within the meaning of § 703(a)(1) of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a)(1) (1988). A similar permissible inference is appropriate in the dealer termination context.

IV. CONCLUSION

The current state of the law in antitrust's third sphere is profoundly unsatisfying. The deeper resonances of the law have been abandoned in favor of a mean-spirited approach that is inconsistent with the will of Congress, unrealistic and unreliable in its assumptions, and virtually unyielding in its conclusion that whoever seeks to invoke the law's protections deserved the fate it suffered.

Something is missing. Few seriously dispute that intuitive notions of fairness played a significant role in the formation of antitrust law. The issue is not whether fairness has relevance to antitrust or whether there really is any left side of antitrust at all, but rather whether there is any principled way to take fairness into account. The challenge is to articulate a sensible concept of fairness that can be integrated with efficiency concerns in some coherent and workable fashion.

The necessary synthesis is not easy, but there is no reason why the sensitive balancing of important social interests should be easy. Chicago School advocates arrived at their simpler rules by assuming away the problem's complexity. They have done valuable work on the efficiency half of the equation, the right side, but a more faithful approach to antitrust requires that the fairness component, the left side, now receive equal consideration and that both concerns be integrated into workable rules that can be invoked to decide real cases. The process of formulating these new rules is the next step in the evolution of antitrust.